No. 91-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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STATE OF GEORGIA,
Petitioner,

-against-

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

AMICUS CURIAE BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the United States Constitution prohibits a criminal defendant from exercising peremptory challenges based upon race.

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AMICUS CURIAE BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 5,000 lawyers and 25,000 affiliate members who are citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors,

or judges of the state or federal courts. Members of NACDL regularly represent defendants who are tried by juries in both state and federal courts. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that this issue is of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court.

The parties have consented to the filing of this amicus curiae brief. A consent to file has been forwarded to the Clerk of the Court.

SUMMARY OF ARGUMENT

The State of Georgia has struck preemptively against three white defendants in Albany, Georgia charged with committing simple battery and aggravated assault against two African Americans who were allegedly using their laundromat; it claims that the defendants will exercise their peremptory strikes to keep African Americans off the jury, and seeks to constrain these defendants with a rule analogous to that set forth by this Court in Batson v. Kentucky, 476 U.S. 79 (1986). This Court should reject the State's proposal for reasons that go to the fundamental nature of the defendant's Sixth Amendment right to a jury trial.

First, the criminal defendant is not a state actor but an unequal opponent of the government whose power the Constitution seeks to enhance through "rights" which tilt the balance in his or her favor. The defendant may lose liberty and even life itself. It would be simply unfair and unworkable to attribute to one defending against the government the very

statelike qualities that constrain the government in its relations with the defendant; the accused is the quintessential private party.

Second, the defendant's right to the peremptory challenge secures his or her Sixth Amendment right to a jury trial by insuring that the defendant will be tried by a group of persons whom he or she determines to be fair and in whom he or she has trust. To place any constraint on the peremptory challenge would undermine the defendant's right to a fair trial because it would force the defendant to accept a jury infected by bias which the "for cause" challenge cannot ferret out. The defendant detects this bias during an inherently subjective and interpersonal exchange in voir dire. The government cannot by definition experience such subjectivity because "it" is not a person, but a sovereign without a specific race or persona. "It" also cannot sense the fear the defendant experiences because it is not the object of accusation. The defendant's interest in protecting against bias outweighs the concerns of the

rejected juror or the community polarized along racial lines. The juror is not at risk of losing life or liberty, and will perceive the defendant's strike as the defensive gesture it is by one stripped to a position of almost total powerlessness. The community's desire to convict amounts to mob rule and should not be sanctioned by this Court.

Third, criminal defendants, who are disproportionately members of racial minorities, should be permitted to make race-conscious decisions in the exercise of their peremptories to diminish the effect of racism on their trials. Despite our efforts to achieve a system of criminal justice which is "colorblind," the system is in fact pervaded by race prejudice. As a result, a defendant who is a racial minority is correct in assuming that an all-white jury views him or her without the idealism toward which color blindness aspires. That defendant must therefore be able to invoke what is essentially a defensive right to strike those on the venire whom he or she reasonably infers would be incapable of confronting and suppressing their

racism. The right is grounded in the Equal Protection Clause itself and grows out of decisions issued by this Court over the past century culminating in Batson: the defendant's right to a jury, which can view him or her without the racial animus which for centuries has distorted our system of criminal justice.

ARGUMENT

I.

A CRIMINAL DEFENDANT IS AN INDIVIDUAL ACCUSED BY AND ENGAGED IN AN ADVERSARIAL CONTEST AGAINST THE STATE AND SHOULD NOT BE DEEMED A STATE ACTOR

The question of whether criminal defendants are constrained by the Equal Protection Clause depends on whether they can be deemed "state actors." In a case decided last Term, Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991), this Court held that a private civil litigant could raise the equal protection claim of a person whom the opposing party has excluded from jury service while exercising its

peremptory challenges. Id. It reasoned that, under the analysis set forth in Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982), "a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges," 111 S. Ct. at 2083, because the civil proceeding itself depends upon the state for its existence and functioning. Id. at 2083-87. This Court was careful, however, to limit the precise holding in Edmonson to the "ordinary context of civil litigation in which the government is not a party . . . ." Id. at 2086 (emphasis added). It did so in implicit recognition of the fact that state action analysis rests upon a close factual exegesis of the "peculiar facts or circumstances present[ed]," because the "largeness" of government creates a "multitude of relationships" between private parties and the state, only some of which can reasonably be characterized as so infused with the government's presence as to turn a private party into a "state actor." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722, 725-26 (1961).

The "peculiar" facts presented by the case at bar -- the anticipated exercise of peremptories by a criminal defendant -- place it outside the narrow reach of Edmonson. In contrast to the civil litigant, who shares with its opponent the exact same relationship to the (nonparty) state, a criminal defendant is engaged in battle against the state. A criminal trial thus introduces the power of the government as a party into the proceeding in a way that disrupts the symmetry between the parties found crucial to this Court's holding in Edmonson.

That this Court believed the symmetry important is reflected in its rejection of the Edmonson respondent's reliance upon Polk County v. Dodson, 454 U.S. 312 (1981), in which a public defender was held not to be a state actor because her relationship with the government was otherwise "adversarial." Polk County, 454 U.S. at 320 & 322 n.13. The typical civil litigant, this Court held, unlike a public defender and a fortiori a criminal defendant, does not seek to defeat the state but rather to use the judicial process (the state) to defeat its civil

(and non-state) opponent. It noted that

> [i]n the ordinary context of civil litigation in which the government is not a party, an adversarial relation does not exist between the government and a private litigant. In the jury-selection process, the government and private litigants work for the same end. [In Dodson], a government employee was deemed a private actor because of his [or her] purpose and functions . . . .

Edmondson, 111 S. Ct. at 2086 (emphasis added). Further on, the Court restated the comparison drawn in Polk County between the role of the public defender and a state-employed physician by characterizing the civil litigant's relationship to the government as more like that of the physician in West v. Atkins, 487 U.S. 42 (1988), than the defender in Polk County. Edmonson, 111 S. Ct. at 2086.

A close look at Polk County and Atkins clarifies the difference emphasized in Edmonson. The defendant in Polk County brought an action under 42 U.S.C. § 1983 based on the claim that his attorney's successful motion to withdraw as counsel from his appeal of a conviction for robbery violated his constitutional rights. Polk County, 454 U.S. at 314-15. This

Court held that he had no civil claim because a public defender does not act "under color of state law." It reasoned that the criminal defense attorney owes the client an "undivided loyalty," particularly while "performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Id. at 325.[1] Cf. Ferri v. Ackerman, 444 U.S. 193, 204 (1979) (although court-appointed counsel serves pursuant to state authorization and in furtherance of the constitutional requirement of the Sixth Amendment, her duty is not to the public at large as is the government's, but to her client).

In Atkins, an inmate brought a claim under 42 U.S.C. § 1983 for mistreatment by a physician who worked under contract providing medical services to the state prison-hospital. This Court permitted the claim and distinguished Polk County with the following point: "In contrast to the public defender,

[1] The only situation in which public defender might act under "color of state law" is when he or she performs "certain administrative and possibly investigative functions" such as hiring and firing employees. Id. at 324-25. See, e.g., Branti v. Finkel, 445 U.S. 507 (1980).

[the physician's] professional and ethical obligation to make independent medical judgments, did not set him in conflict with the State and other prison authorities. Indeed, his relationship with other prison authorities was cooperative." 108 S. Ct. at 2256 (emphasis added). The defense lawyer's distinctively "adversarial role" in the criminal justice system was, according to the Atkins Court, the decisive factor in Polk County which distinguished the public defender from those public employees who perform their duties "under color of state law." Id.

Criminal defense attorneys -- even those paid by the government -- should not be burdened with responsibilities to any party other than the accused while fulfilling their constitutional "purpose and function" of battling the government. Several amicus curiae attempt to distinguish Polk County with the proposition that the task of exercising peremptory challenges is different in kind from the myriad of

other functions performed by defense counsel.[2] The Solicitor General, for example, argues that "tactical decisions such as determining what defenses to raise, what questions to ask on cross-examination, what objections to make to the prosecutor's evidence, whether the defendant should testify, and what witnesses to call, if any" are "fundamentally private ones," whereas the exercise of the peremptory by the defense is "governmental" in character because the government itself "gives the defendant the right to participate in the selection of the body that will evaluate both parties' evidence." Brief for the United States As Amicus Curiae Supporting Petitioner at 17-18. This distinction cannot be controlling.

The decision to strike a particular juror is nothing if not tactical; the accused may instruct counsel to make the challenge out of an intuitive sense that the prospective juror will be not

[2] The following amicus curiae supporting petitioner discuss Polk County: Brief for the United States at 17-19; Brief of the Criminal Justice Legal Foundation at 20-23; Brief for Charles J. Hynes, District Attorney, Kings County, New York [hereinafter "Charles Hynes"] at 15-17.

fair. Conversely, the fact that the government "gives" the defendant a particular right does not imbue that right with sufficient public character to transform its exercise into state action, as the enumeration of any number of rights, all of which the Solicitor General concedes are "private," demonstrates. The government, for example, not only grants the defendant the Sixth Amendment right to subpoena witnesses on his or her behalf, but also provides a specific mechanism for its enforcement in federal court in Federal Rule of Criminal Procedure 17 and particularly Rules 17(a) and (d).[3] As the rule makes plain, the government, in the persons of a United States judge and clerk, effect the process of calling witnesses

[3] Rule 17(a) and (d) provide in relevant part (emphasis added):

> (a) A subpoena shall be issued by the clerk under the seal of court. . . . It shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed . . .
>
> (d) A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age.

and allow for the participation of a United States marshal. This state involvement in a criminal defense attorney's tactical decision to call witnesses for the defense is as powerful as the trial court's sanctioning of a peremptory strike, but it clearly does not transform the attorney into a state actor. He or she remains a private party whose resources, by comparison with the government adversary, are deemed unequal.

In Polk County itself, this Court listed as typical representational functions immune from review under section 1983, the entering of "not guilty" pleas, moving to suppress evidence, objecting to government evidence at trial, cross-examining government witnesses and making closing arguments on the client's behalf. Polk County, 454 U.S. at 320. All such functions are "statelike" in the sense argued by the New York Kings County District Attorney, Charles Hynes, because all, and particularly such tasks as getting evidence illegally obtained suppressed, cannot be accomplished without the "joint activity of the defense attorney and the trial judge." Amicus

Curiae Brief of Charles Hynes at 17. The decision to characterize a criminal defense attorney's exercise of peremptory challenges as state action should not turn on the making of false distinctions between plainly representational activities. Rather, the decision should turn on whether, in all fairness, the defendant should ever be deemed a state actor. Lugar, 457 U.S. at 937.

To appreciate why a defendant should not be deemed a state actor, it is necessary to deconstruct the meaning of the term "state." The "state" in Edmonson was comprised of Congress, which had enacted the statutes setting forth qualifications for jury service and procedures by which jurors were to be selected, summoned, assigned, excused, paid, and punished, 111 S. Ct. at 2084; and the trial judge, who exercised some control over voir dire and who ministered to the act of excusing the struck jurors. Id. In a criminal trial, by contrast, the "state" includes not only legislative and judicial actors, but also the Executive Branch itself, the

function of which is to enforce the laws against private citizens through deployment of its prosecutorial power. The introduction of this very potent state actor into the process disrupts the equipoise between the parties found controlling in Edmonson. Unlike civil litigants, who are similarly situated with respect to the state (the judge and Congress), a criminal defendant is drawn into intense conflict with the state (the prosecutor) in a struggle over the basic constitutional right of liberty. When this Court's majority in Edmonson noted that the "government and private litigants work for the same end," id. at 2086, it did not mean that private litigants work for the exact same end with respect to each other, id. at 2094-95 (O'Connor, J., dissenting), but rather that they each share the same type of relationship with the entity which has established the machinery for combat.

The criminal battlefield, however, is not drawn with such symmetrical boundaries. In fact, the proceeding is asymmetrical by constitutional definition because the

"possession" which the defendant stands to lose is not property, but liberty, and even life. The parties in a criminal trial have different roles, rights, and responsibilities. The defendant's posture is a protected one, and within certain limitations, he or she litigates by "less cumbersome" rules.

The accused, for example, enjoys a number of trial-related rights, including the presumption of innocence, the Fifth Amendment privilege against self-incrimination, Fifth and Fourteenth Amendment due process rights, and Sixth Amendment rights to trial by impartial jury, to confront and cross-examine adverse witnesses, to compulsory process for obtaining favorable witness testimony, and to the assistance of counsel in mounting a defense. See U.S. Const. amends. V, VI, and XIV, § 1. The government enjoys no comparable constitutional protections. Moreover, unlike the situation in Edmonson, in which the parties were constrained by the same pretrial rules, discovery obligations in the case of a criminal trial flow predominantly in favor of the defense: the

government has an affirmative obligation to disclose evidence favorable to the defendant, Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972), whereas the defendant is entitled to refrain from serving as an investigative tool against him or herself and may conceal information helpful to the government. Perhaps the strongest evidence of the constitutional advantage afforded the defendant is the due process requirement that the government prove its case against the defendant beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); see also Williams v. Florida, 399 U.S. 78, 111 (1970) (Black, J., concurring in part and dissenting in part) ("[T]actical advantage to the defendant is inherent in the type of [criminal] trial required by our Bill of Rights.").[4] See generally Katherine Goldwasser, Limiting a

[4] As the United States Court of Appeals for the Second Circuit stated in rejecting the argument that fairness requires identical treatment of the parties in a criminal case:

> A criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding. The prosecution assumes substantial affirmative obligations and accepts numerous restrictions, neither of which are imposed on the defendant. . . . [I]n the context of criminal investigation and criminal trials, where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle . . . .

United States v. Turkish, 623 F.2d 769, 774-75 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); see also Dunham v. Franks Nursery & Crafts, Inc., 919 F.2d 1281, 1292 (7th Cir. 1990), cert denied, 111 S. Ct. 2797 (Ripple, J., dissenting) (discussing ways in which civil and criminal trials are "simply different").

Criminal Defendant's Use of Peremptory Challenges: On Symmetry And the Jury in A Criminal Trial 102 Harv. L. Rev. 808, 821-26 (1989); Susan Bandes, Taking Some Rights Too Seriously: The State's Right to a Fair Trial 60 S. Cal. L. Rev. 1019 (1987).

The asymmetry of the criminal process, when contrasted with the exacting symmetry of a civil proceeding, reflects the heightened constitutional concern over the liberty interests at stake and the imbalance of power which that asymmetry attempts to equalize. In a civil proceeding, a defendant (or a plaintiff initiating a cross-claim) is at risk of losing property. A defendant in a criminal trial, by contrast, is at risk of losing liberty, or even his or her life. Although

both property and liberty are interests of constitutional significance, see U.S. Const. amend. V, they are not afforded equivalent protection under the Due Process Clause.[5] For example, in Addington v. Texas, 441 U.S. 418 (1979), this Court held that the high standard of proof applicable in a criminal proceeding (beyond a reasonable doubt), when compared with the minimal standard of proof applicable in a civil contest over property (preponderance of the evidence), reflected a societal belief that safeguards were necessary to protect against deprivation of life and liberty. Id. at 423-26; see also Winship, 397 U.S. at 372 (Harlan, J., concurring) (proof beyond a reasonable doubt bottomed on fundamental value determination that "it is far worse to convict an innocent man that to let a guilty man go free."); cf. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (process due a recipient of

[5] The fact that no fewer than five constitutional amendments, see U.S. Const. amend. IV, V, VI, VIII, and XIV, § 1, are devoted to protecting the defendant against the government suggests the centrality of the values of "life" and "liberty" in the framers' vision.

governmental benefits depends upon a balancing of the private interest affected by the official action, the risk of erroneous deprivation, and the probable value, if any, of additional or substitute procedural safeguards"). Perry v. Sindermann, 408 U.S. 593 (1972) (state junior college professor was denied procedural due process when college failed to afford him a hearing before deciding not to renew his contract). The entire criminal process, in short, is designed to tilt the constitutional balance in favor of the accused because he or she has so much at stake. As the Court emphasized in Lugar, 457 U.S. at 939, and reemphasized in Edmonson, 111 S. Ct. at 2083, state action determinations are "factbound" inquiries, but under no circumstances should private action be attributed to the state unless the party can, "in all fairness" be deemed a governmental actor. Id. (emphasis added). It is difficult to imagine a party to whom it would be less fair to attribute government power than one locked into combat against his or her will with the state itself. See Goldwasser, supra at 820.

The criminal defendant needs to muster whatever resources he or she can to mount a defense against an attack on that freedom. One critical resource is the peremptory itself.

In the case which preceded Batson, 476 U.S. 79 (1986), Swain v. Alabama, 380 U.S. 202 (1965), this Court recognized the nonequivalent stature of the parties to a criminal proceeding when it set forth the demanding level of proof for making an equal protection claim against the state's discriminatory use of peremptories.[6] It held that the criminal defendant in Swain itself had failed to satisfy that standard, in part because he did not show who was responsible for removing African Americans from the county's juries. Implicit in the Court's analysis was a holding that the criminal defendant's use of peremptories did not constitute state action. It stated that

> a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State. The ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials.

[6] Batson overruled the "proof" requirement of Swain because it effectively had denied defendants the ability to make a showing of discrimination during the course of a specific trial.

Id. at 227 (emphasis added). Edmonson has done nothing to change this fundamental view of the relative powers of the criminal defendant and the state adversary against which he or she is pitted. Roman v. Abrams, 608 F. Supp. 629, 633 (S.D.N.Y. 1985) (holding that defendant and defense counsel are not state actors in exercising peremptories). The combative nature of that relationship has prompted many courts and commentators alike to conclude that the criminal defendant is not at any point imbued with powers of the government. See, e.g., Goldwasser, supra at 813 n.26 (collecting cases and commentary).

This Court should insure that this position remains the law by holding that a criminal defendant does not become a "state actor" when exercising a right which secures the meaningful exercise of his or her Sixth Amendment right to a

jury trial.

II.

UNFETTERED PEREMPTORY CHALLENGES SECURE THE MEANINGFUL EXERCISE OF THE ACCUSED'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL, AND SHOULD NOT BE BURDENED TO VINDICATE THE INTERESTS OF THOSE WHOSE LIBERTY AND LIFE ARE NOT AT STAKE

Placing any constraint on the defendant's exercise of the peremptory challenge would fatally undermine its utility to the defense in a way which does not similarly impair the government. In Holland v. Illinois, 493 U.S. 474, 110 S. Ct. 803 (1990), this Court held that the government's discriminatory use of peremptories does not violate the defendant's right to an impartial jury; yet the question presented here, which suggests that the defendant's exercise should be constrained, would impair the defendant's Sixth Amendment right to a jury trial by fatally undermining the defendant's ability to keep from the jury those whom the defendant senses will not be fair. In the former case, the

defendant might lose jurors whom he or she prefers, but in the latter, the defendant is forced to accept people about whom he or she harbors deep distrust. This burden would operate as an even more severe constraint than the loss of a peremptory itself;[7] it could affect an entire set of challenges, particularly in communities polarized by racial conflict, as is the case here. It could result in the forced seating of jurors whom the defendant has determined harbor racial animus.

A. The Defendant Has A Uniquely Personal Stake In The Unfettered Exercise Of The Peremptory Challenge.

The defendant's use of the peremptory gives expression to the uniquely personal and subjective nature of the interaction between the defendant and his or her potential jurors and jury. For both the government and the defense, peremptory challenges provide assurance that the resultant jury will be impartial. Swain, 380 U.S. at 219 (1965) (peremptories

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[7] See Ross v. Oklahoma, 487 U.S. 81 (1988).

"eliminate extremes of partiality on both sides"); see also Holland, 110 S. Ct. at 808 (1990) ("one could plausibly argue that the requirement of an impartial jury impliedly compels peremptory challenges") (emphasis in original); Batson, 476 U.S. at 91 (peremptories traditionally viewed as one means of assuring selection of unbiased jury). Yet peremptories have another and entirely separate function which is specific to the accused: to give effect to that individual's intuitive and inherently subjective reaction to a potential juror. Allowing the defendant to express this reaction by exercising a peremptory challenge acknowledges his or her uniquely personal stake and individual persona in the criminal process. Although the government, in the person of a specific prosecutor, may also have an intuitive dislike of a potential juror, that prosecutor's involvement in the trial is not personal but civic. He or she represents the sovereign, and as such, is responsible for vindicating the public good without bias or animus. Thus, although it is entirely appropriate and in fact

consistent with the goal of insuring a fair trial to give expression to a defendant's intuitive distrust of a potential juror, it is completely inappropriate to give effect to such feelings in a prosecutor. See Goldwasser, supra at 829-831. As Blackstone put it, "how necessary it is that a prisoner . . . should have a good opinion of his jury, the want of which might totally disconcert him." 4 W. Blackstone, Commentaries 353, quoted in Goldwasser, supra at 829.[8]

For over one hundred years, this Court has stressed the role that peremptories play in securing the defendant's trust in the legitimacy of the criminal proceeding. In Lewis v. United States, 146 U.S. 370 (1892), it reversed a conviction because the trial court required the defendant to exercise his peremptories outside of the jury's presence. The defendant's

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[8] The fact that the federal rules grant the defendant a greater number of peremptory challenges than the government reflects a legislative determination that the two parties' interest in the challenge is not identical. See Fed. R. Crim. P. 24. Many state jurisdictions, including Georgia, also grant the defendant more peremptories than the government. See Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Juries, app.D at 282-84 (1977).

peremptory, the Court emphasized, must be allowed unfettered expression so that it can serve its function of securing the accused a fair trial. Id. at 376. By depriving the defendant of the opportunity to observe and visually compare each juror while he executed his challenges, the trial court fatally undercut the usefulness of those challenges to him. Id. at 376-78. See also Pointer v. United States, 151 U.S. 396, 408 (1894) (emphasizing the need to allow the defendant unrestricted exercise of peremptory challenges).

In Batson this Court again emphasized the trust relation built between the defendant and his or her jury when it linked the government's denial of equal protection to the defendant with its denial of equal protection to the juror. Id. at 86 (equal protection guarantees defendant that State will not exclude members of his or her race from venire on account of race). The Batson standard for determining a prima facie case, in fact, placed the racial identity between the defendant and the excluded juror at its center by requiring that the defendant first

establish his or her membership in a "cognizable racial group" and that the government exercised peremptories to remove from the venire members of the defendant's race. Id. at 96. Last Term, in Powers v. Ohio, 111 S. Ct. 1364 (1991), this Court eliminated the requirement that the defendant prove his or her racial identity with the excluded juror, but emphasized in even more explicit terms than did Batson that the (ideal) relationship between the defendant and jury was premised on a "bond of trust" which developed with the defendant's involvement in picking the body ultimately chosen to decide his or her fate. Id. at 1372. This trust is the defendant's faith that the jurors will judge him or her fairly. The Court characterized their relationship as "close if not closer than" those previously recognized to convey third-party standing. Id.

The historical development of the peremptory indicates that its primary purpose was to protect defendants. Goldwasser, supra at 827-28 & n.1114-18. See also Developments in the Law: Race and the Criminal Process 101

Harv. L. Rev. 1472, 1582 & n.171 (1988) (hereinafter "Developments"). Some of its earliest advocates, including the influential legal commentator Sir William Blackstone, clearly saw it as a defendant's exclusive right, "'a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous.'" 4 W. Blackstone, Commentaries 353 (emphasis added), quoted in Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Juries 147 (1977). Hundreds of years before, in 1305, the English Parliament completely eliminated the right of the "crown" to challenge prospective jurors except for "cause certain," but continued to allow defendants thirty-five peremptory challenges. See Van Dyke, supra at 147.[9]

[9] In 1530, the Parliament reduced the number to twenty in all cases except high treason; the number in England is now set at seven. See Van Dyke, supra at 148. The crown, however, was able to evade the preclusion against its exercise of peremptories by developing the practice of "standing aside," which operated as the functional equivalent of peremptories: the prosecutor would designate a certain number of jurors to "stand aside" and would not be forced to explain its decision if the court could empanel twelve unchallenged jurors. Id.

Various colonial and state courts accepted the 1305 law as part of the received common law but resisted granting the government the peremptory right; both New York and Virginia, for example, denied the government any peremptory challenges for most of the nineteenth century. Even states which eventually allowed the government this type of strike limited their number dramatically, as the case of Delaware makes plain. In 1782, the Delaware legislature determined that the defendant should have six peremptory challenges and the government three but added the provision that for each challenge actually executed by the government, the defendant would be compensated with an extra one. Id. at 147-48.

B. The Defendant's Right To An Unfettered Peremptory Challenge Is Bound Up In, And Gives Expression To, The Sixth Amendment Right To A Jury Trial Itself.

The peremptory challenge has been treated as essential to securing the defendant's Sixth Amendment right to a fair jury trial. Swain, 380 U.S. at 218-19. When a venire of

thirty to forty persons walk into the courtroom, each member automatically turns to look at the defendant. Throughout voir dire, they look at the defendant, making facial expressions in response to questions, and using body language in reaction to answers given by others. All of these subtle movements are signs of attitudes toward the defendant which will ultimately affect the outcome of the trial. All of them are indications of likes and dislikes, biases, and beliefs which will ultimately affect how a person will view the evidence and react to the defense. A potential juror who shifts in his seat and folds his arms in response to a question about whether he has any problems with an insanity defense is communicating a feeling that the defendant is entitled to believe will negatively affect that juror's ultimate decision. Yet no strike for cause will prevail, particularly in federal court where voir dire is so limited, provided the juror states that he can be fair and impartial. Cf. Rosales-Lopez v. United States, 451 U.S. 182 (1981). And as all practicing trial attorneys know, most

prospective jurors will claim they can be fair, and may even be unconscious of the bias they feel and convey despite this representation. Nothing could so undermine a defendant's confidence and trust in a jury as to be faced with twelve people, even some of whom have demonstrated, through such subtle gestures, an antagonism that might prevent the possibility of a fair trial.

The subjective exchange described above, an exchange which characterizes jury selection, suggests how antithetical to human experience it would be to deny the defendant the unfettered right to act upon assumptions concerning a juror's view of him or her, even when those assumptions are informed by race. Unlike the government, the criminal defendant is a person of a specific race (and, inter alia, gender, class, ethnicity). His or her decision to exercise a peremptory challenge not only reflects the defendant's perception of a potential juror, but as importantly, the defendant's perception of that juror's perception of him or her, one which the

defendant may fairly presume includes assumptions about the defendant's race. In other words, race may be a part of the complex of factors giving rise to the defendant's belief that a potential juror would not be fair or sympathetic to a recognized legal defense.[10] The defendant who strikes a juror is not declaring to society that he or she believes the juror to be inferior or subordinate, or even that he or she dislikes people of that race, but rather that he or she perceives the juror to dislike him or her. See Harry Zirlin, Unrestricted Use of Peremptory Challenges by Criminal Defendants and Their Counsel: The Other Side of the One Color Jury 34 N.Y.L. Sch. L. Rev. 227, 246, 247 (1989). The strike, like the posture of the individual on trial, is entirely defensive.

The government is in an entirely different position because by definition it is a sovereign "entity" devoid of race or any specific human characteristic. It has no persona, no

[10] Jurors may be hostile, for example, to such common defenses as duress, entrapment, insanity, or consent.

body language, and gives no first impression.[11] "It" therefore cannot have a subjective interaction with a potential juror, and can only exercise a race-based challenge by making racial assumptions about the interaction between the defendant and the juror. Yet Batson clearly stands for the proposition that it is impermissible for the government to make such assumptions. The ideal world, and the standard to which the government must be held in the exercise of its peremptories, is one in which race does not work to the disadvantage of any person, including a defendant or potential juror.

The difference between the defendant and the government extends beyond the fact that the defendant is a person, and the government an entity. It also encompasses the disparity in power which this basic contrast implies. In a criminal prosecution, the defendant is a private being who

[11] One jury instruction, in fact, suggests that the jury not consider the persona of counsel for either the government of the defense. See Devitt & Blackmar, Federal Jury Practice and Instructions, §10.12 (3d ed. 1977); another instruction advises to consider only the guilt or innocence of the accused and no other person. Id. at §11.06.

lacks any real capacity to inflict harm, whereas the government assumes one of its most powerful (peacetime) roles. When the accused strikes, the potential juror is far more likely to perceive it as a defensive act committed by an individual thrust into a position of relative powerlessness; when the government strikes, by contrast, the juror can and should perceive it as an offensive move through which the sovereign communicates its belief in that juror's unfitness to serve. Cf. Stephen R. Carter, When Victims Happen To Be Black 97 Yale L.J. 420, 429-33 (1988) (distinguishing between racial consciousness and racism and arguing that the former is not the same evil as the latter). The assertion of amicus curiae Charles Hynes, district attorney, that "excluded jurors may well believe the prosecutor is responsible for discrimination in jury selection, no matter who is in fact responsible," Brief of Charles Hynes at 19, is true only if the jurors are precluded from knowing who makes the strike, and can easily be remedied with a simple rule requiring that defense and government challenges be

communicated to the panel as distinct.[12]

C. The Defendant's Sixth Amendment Right To A Fair Trial, Which The Unfettered Peremptory Insures, Outweighs The Interests Of The Juror And The Community

Against the defendant's interest in peremptories, the petitioner and amicus curiae posit two competing concerns: the interest of the prospective juror under the Equal Protection Clause to be free of racial discrimination and the interest of the community to be assured that "justice" is done. Yet framing the issue this way assumes the very state action by the defense which is contested. The deeper question as to whether the defendant should in all fairness be deemed a state actor is a policy decision which can be restated in the following manner: does the juror's interest in serving on a particular petit jury override the criminal defendant's rejection of that juror out of subjective lack of faith and trust; and does the community's

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[12] If the juror continues to hold the government responsible for discriminatory strikes, that may be because the government, and not the defense, has excluded racial minorities from jury service for years. See infra at 54-56.

interest in taking a defendant's liberty, when that community has been polarized by racial conflict, outweigh the defendant's need to protect that liberty by striking certain jurors? The answer to both questions must be never, if the fundamental character of the jury trial system is to be preserved.

First, as suggested by this Court in Batson, 476 U.S. at 87 and Powers, 111 S. Ct. at 1370-74, a prospective juror's interest in being on a particular jury is linked to the defendant's interest in having him or her serve, because for both the integrity of the process is cast in doubt when the government excludes that juror on the basis of race. The defendant will in almost all cases "be a motivated, effective advocate for the excluded venire persons' rights" because, as this Court points out, "discrimination in the jury selection process may lead to the reversal of a conviction." Powers, 111 S. Ct. at 1372. Moreover, because the government has been and continues to be the party which frequently discriminates against racial minorities to secure a conviction,

see infra at 54-56, the defendant has an adversarial (and liberty) interest in scrutinizing the basis for the government's attack on any prospective juror who is a racial minority. See infra at 54-59.

In the rare case when those interests diverge, however, the juror's desire to serve must give way to the defendant's right to unfettered exercise of peremptories because the defendant's interest in the process is simply greater: the jurors are not on trial and are not at risk of losing their liberty or life. The distrust communicated to the excluded juror by one who essentially conveys: "I do not have confidence that you like me well enough to judge me fairly" pales when compared to the harm inflicted on the defendant whose right to a fair trial was impaired by his or her inability to give expression to this lack of trust. A Korean defendant would feel a deep sense of despair, for example, if an African American juror were allowed to serve who had, in voir dire, rolled her eyes upon being told that the defendant had struck an African American

patron in defense of his property or person. .That juror must be challenged even if otherwise qualified to serve because the defendant believes her to be psychologically "closed" to his persona and therefore predisposed to convict. "The purpose of the jury system," this Court held in Powers, "is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." 111 S. Ct. at 1372. The defendant suffers the "real injury" if this confidence is undermined. Id.

Second, the community's interest in a fair trial should not be confused with what amounts to mob rule. The petitioner and several amicus curiae suggest that racial tension will erupt in cases involving a real or perceived charge of racially motivated conduct if this Court does not constrain the defendant's exercise of peremptories. See Brief of Petitioner at 13-14; Brief of the Criminal Justice Legal Foundation at 13-14; Brief of Charles Hynes at 4-5; Brief of the United States

at 23.[13] This argument appears to elevate the community's oftentimes unfounded desire to see a defendant jailed above the defendant's right to use peremptories to facilitate his or her constitutional entitlement to a fair trial, a threat which this Court must not appease. In the case of the Howard Beach incident in New York City, for example, the community belief underlying its desire to seat an African American on the jury was that the jury would be more likely to do what the community, without the benefit of trial, believed should result: convict the white defendants. It is a premise of trial by jury, however, that the "crowd" not be permitted to unleash its retributive fury on accused and powerless individuals. This Court has often balanced individual rights against society's interest, but this Court must never allow racial animus to tilt

[13] The petitioner and amicus curiae point to several state decisions, see e.g., People v. Kern, 75 N.Y. 2d 638, cert. denied, 111 S. Ct. 77 (1990); People v. Wheeler, 22 Cal. 3d 258 (1978), in which courts held that the defense could not make racially based peremptory challenges. These cases, however, rest on state constitutions, and do not appear to consider the arguments raised herein.

the balance in society's favor. The "crowd" should use the ballot box and not bomb the courthouse.

Trials have symbolic power. They can quickly become public events driven by intense conflicts that are often based on feelings and beliefs having little to do with the facts at hand.[14] That does not mean that the public and jury's perception of justice are always at odds. It does mean that this Court should be wary of making constitutional law based solely upon

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[14] A pointed recent example is the racial tension which erupted in New York City in September 1991 in the aftermath of a car accident which left a seven year old African American boy, Gavin Cato, dead. The driver of the car which hit the boy was Yosef Lifsh, who is a part of the Lubavitch Hasidic community in Brooklyn. The accident sparked several days of violence in the Brooklyn neighborhood, during which a young Jewish student from Australia was stabbed to death. Sixteen year old Yankel Rosenbaum, an African American, is charged with second degree murder and criminal possession of a weapon in connection with that event. The black community -- which includes American-born and Caribbean-born blacks in central Brooklyn -- made the prosecution of Mr. Lifsh a central demand in their demonstrations, although on September 5, 1991, a Brooklyn grand jury refused to return an indictment. Reverend Al Sharpton, who had led protest marches of blacks through the neighborhood, denounced the finding and called for renewed protests. See Andrew Yarrow, "Bid to Unseal Crown Heights Testimony Founders," N.Y. Times, Sept. 17, 1991, at B4; Steven Myers, "Judge Won't Open Records of Crown Heights Inquiry," N.Y. Times, Sept. 7, 1991, at 27; John Kifner, "Grand Jury Doesn't Indict Driver in Death of Boy in Crown Heights," N.Y. Times, Sept. 6, 1991, at 1.

"community" perceptions of what should happen at a criminal trial. The few nationally prominent examples of white defendants charged with acts of racial violence who attempt to strike African Americans from their juries present the Court with moving examples of the African American community's frustration over what appears to be a never-ending history of oppression. Although that frustration is valid, it cannot be alleviated by convicting white defendants, any more than executing whites can bring back African Americans lynched by white mobs in one of the most chilling historical examples of the jury system's failure. Justice should not use "revenge tragedy" as its model.

The community's interest in the outcome of a jury trial can only be as great as the government's interest in vindicating "justice." And yet the government and the accused are not symmetrically aligned in the criminal proceeding. The government, unlike the defendant, is not entitled under the Sixth Amendment to a fair trial or an impartial jury; those

fundamental rights are specifically vested in the accused to protect against the "awesome investigative and prosecutorial powers of the government." Williams v. Florida, 399 U.S. at 112. In fact, the government's responsibilities in a criminal prosecution ideally extend in some measure to the accused him or herself, a notion eloquently captured in a statement by this Court that the prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).[15]

The case frequently invoked for the proposition that "between [the accused] and the state the scales are to be evenly held," Hayes v. Missouri, 120 U.S. 68, 70 (1887), can safely

[15] See also American Bar Association Standards Relating to the Administration of Criminal Justice, Standards 3-1.1(b) & (c) (2d ed. 1979) (prosecutor is both an administrator of justice and advocate whose duty is to seek justice, not merely to convict).

be characterized as a nineteenth century effort to undermine the Constitution's fair cross-section requirement. The petitioner, John Hayes, challenged on equal protection grounds the state's legislative determination that defendants in capital cases be afforded fifteen peremptories in cities with a population of more than 100,000 and eight in all other places. The Court upheld the distinction by noting that

> [e]xperience has shown that one of the most effective means to free the jurybox from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. . . . In our large cities there is such a mixed population, there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors.

Id. at 70, 71. The Hayes Court did not rule, as is sometimes suggested, that the government has any constitutional right to a fair trial. Rather, it acknowledged that although the accused

has a right to an impartial jury, the procedures by which juries were selected remained "matters of legislative discretion." Id. at 70. See Goldwasser, supra at 824-25.

When thrust into the fray of litigation, the government often strays from the ideal of securing "justice." In a recent argument before an en banc panel of the United States Court of Appeals for the Ninth Circuit, for example, the United States Attorney for San Diego, William Braniff, expressed some hesitation when pointedly asked by the panel whether he accepted the duty to pursue justice instead of a conviction. See Charles Bird, "Batson, U.S. Attorney's Belfry," San Diego Daily Transcript, Oct. 16, 1991, at 8A.[16] Batson, 476 U.S. 79, itself, and the years of government practice preceding Batson, see infra at 54-56, demonstrate that when left

[16] The case before the en banc panel, United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990), reh'g granted (en banc), 930 F.2d 695 (9th Cir. 1991), presents the question, inter alia, of whether the Equal Protection Clause prohibits gender-based peremptory challenges by a criminal defendant. Argument took place on September 26, 1991, and the decision is pending.

unsupervised, the government will strike African Americans from venires, particularly in cases in which the defendant was also African American and the alleged victim white. See, e.g., Swain, 380 U.S. 202 (African American defendant charged with rape of white woman convicted by jury from which all African Americans had been struck). A Dallas County prosecutor even prepared a training book for new attorneys in the early 1970's in which he advised that prosecutors should not look for a "fair juror, but rather a strong biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree." The assumption that the prospective jurors would be white is clear from his second suggestion to avoid "any member of a minority group which may subject him to oppression--they almost always empathize with the accused." Van Dyke, supra at 152.

Batson has not eliminated the type of racial bias reflected in this comment. In a recent case, the government

challenged all of the African American women on the venire in a trial involving an African American male defendant whose only witness was an African American woman; the justification offered for three of the four strikes was that the women appeared to come from "questionable living circumstances" because one was a single mother and the other two were living with men to whom they were not married. United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991), petition for cert. filed, (Dec. 10, 1991) (No. 91-6664). These examples, both recent and historical, should warn racial minorities that their interests, like the interest of the "people" of which they are a part, is best served by the accused rather than the government. See Bandes, supra at 1046 (accused represents the "people" when vindicating rights enunciated under the Bill of Rights because these are the people's safeguard against government oppression).

III.

THE MINORITY DEFENDANT MUST BE PERMITTED TO USE PEREMPTORY CHALLENGES WITHOUT CONSTRAINT TO DIMINISH THE IMPACT OF RACISM ON HIS OR HER TRIAL

Criminal defendants are disproportionately members of racial minorities. Studies show that African Americans, Hispanics, Native Americans and other people of color comprise a disproportionate number of those arrested and imprisoned each year. See Developments, supra at 1495. For example, blacks[17] made up approximately 30 percent of the total arrested in 1988, although they represented only 12.3 percent of the United States population.[18] This disproportion is rooted in the racial stereotypes that influence police to arrest minorities more frequently than nonminorities, a process which

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[17] The term "black" appears to encompass divergent groups of black people living in the United States, including African Americans and such other constituencies as Caribbean-born immigrants.

[18] Moreover, as the recent case of the beating of Rodney King by Los Angeles police illustrates, racial minorities are much more likely than whites to be seriously injured in encounters with police officers. See Developments, supra at 1495.

itself generates statistically disparate arrest patterns justifying further selectivity. See Developments, supra at 1508. In addition, a disproportionate number of those criminal defendants tried before a jury are people of color.[19]

Racism pervades our system of criminal justice well after the arrest. Empirical studies demonstrate that racial minorities receive harsher treatment than do whites throughout the prosecutorial decision making process, from the initial decision as to what specific charges to file, to the decision in homicide cases as to whether to seek the death penalty. See Developments, supra 1520-29. These studies indicate that the probability of prosecution is greatest when the defendant is a racial minority and the victim is white, a result most strikingly

[19] Recent statistics show that black Americans comprise a disproportionate number of those convicted or acquitted after jury trial. In 1987, they made up 60.07% of the total number of people tried for all crimes in Manhattan, New York; 30.31% of the total in Portland, Oregon; 41.92% of the total in San Diego, California; 37.65% of the total in Seattle, Washington; and 97.06% of the total in Washington, D.C. See Dep't of Justice, The Prosecution of Felony Arrests, 1987 85-89 (1990). When compared with the 12% of the United States population which is black, these percentages demonstrate a gross disproportion.

confirmed in the well-known study performed by Baldus on the imposition of capital punishment in Georgia and presented to this Court in McCleskey v. Kemp, 481 U.S. 279 (1987). See Developments, supra at 1528-29.[20] Another recent study of federal sentencing under the Sentencing Guidelines reveals that African American men between the ages of eighteen and thirty-five will be required to serve significantly longer periods of time than either white or Hispanic men in the same age group. See Gerald W. Heaney, The Reality of Guideline Sentencing: No End to Disparity 28 Am. Crim. L. Rev. 161, 205-07 (1991).

Racial minorities are also grossly underrepresented on juries. See Developments, supra at 1558 (citing National Jury Project, Jurywork: Systematic Techniques § 5.01, at 5-2 (2d

[20] The Baldus study found that the prosecutor sought the death penalty Georgia in 70% of the cases involving an African American defendant and a white victim; 32% involving a white defendant and a white victim; 15% involving an African American defendant and victim; and 19% involving a white defendant and an African American victim. McCleskey, 107 S. Ct. at 1764.

ed. 1987)).[21] The harm of such underrepresentation falls squarely on the minority defendant because he or she is much more likely to be convicted when tried before an all-white jury than before a racially integrated one. Data and mock trial experiments provide overwhelming evidence that the all-white jury is not impartial when judging a defendant of color. See Developments, supra at 1559-60; Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges 76 Cornell L. Rev. 1, 111-15 (1990). A scholar reported nine

[21] One important source of this underrepresentation is the use of voter lists for creating the master jury wheel from which the "qualified" wheel is formed (the list resulting after removing those who have exemptions, excuses or are otherwise disqualified). Figures indicate that a lower percentage of racial minorities register to vote than do whites. Even if a minority person is registered, however, he or she often must send in a questionnaire to be put on the "qualified" wheel. Because racial minorities are disproportionately poor and transient, they are more likely to fail to receive these questionnaires than are white people. See Developments, supra at 1561-66. In a recent case, a San Diego Superior Court judge found that people of Hispanic heritage who were eligible to serve on the grand jury (18 years and older) comprised 17.6% of the population in San Diego County. Yet, from 1986-1991, only 3.94% of all grand jurors were Hispanic. See People v. Williams, (San Diego County Superior Court, Case No. CR 119537) October 9, 1991 (unpublished).

mock jury studies in which white jurors' bias was reflected in higher conviction rates for African American or Hispanic as compared with white defendants. Id. at 111 n.550. When African American subjects were trial jurors, by contrast, they were more likely to give African-American defendants the benefit of the doubt in close cases. Id. at 112.[22] One study demonstrated that the presence of Hispanics on otherwise white juries managed to diffuse the pretrial racial animus expressed toward the Hispanic defendant. Id. at 113 & n.558. The notion that racism distorts white jurors' view of minority defendants occasionally surfaces in decisions challenging the impartiality of verdicts. In one Wisconsin case, for example, the juror remarked of an African American defendant, "Let's be logical, he's black, and he sees a seventeen year old white girl -- I know the type." State v. Shillcutt, 119 Wis. 2d 788, 791 (1984), quoted in Developments, supra at 1595 n.1.

[22] No studies appear to have focused on the possibility of bias among racial minorities, as for example, the way an African American juror would view an Hispanic defendant.

The government has exploited the attitude reflected by such comments for over one hundred years by attempting to remove racial minorities from juries. In case after case, culminating in Batson, this Court found that the government's efforts to strike minority jurors deprived defendants of the Constitution's guarantee of equal protection under the law. See, e.g., Strauder v. West Virginia, 100 U.S. 303 (1880) (West Virginia law excluded African Americans from jury duty); Neal v. Delaware, 103 U.S. 370 (provision in Delaware constitution excluded African Americans from voting and therefore from jury service); Norris v. Alabama, 294 U.S. 587 (1935) (evidence that no African American had served on jury in over one generation established prima facie case of purposeful state exclusion of African Americans from jury); Whitus v. Georgia, 385 U.S. 545 (1967) (jury commissioner practice of marking names of prospective jurors who were African American established prima facie case of purposeful state exclusion of African Americans from jury); see also

Carter v. Jury Comm'n, 396 U.S. 320 (1970) (civil action alleging discrimination on basis of race brought against state jury commissioners). Implicit in all of these decisions is the assumption that an all-white jury could not be fair to a minority defendant because its perspective would be distorted by race prejudice. Batson itself acknowledged the role of racial identity between the defendant and struck jurors in its requirement that both the defendant and the struck juror(s) be members of a "cognizable" racial group. Id. at 96. Although this Court relaxed that requirement in Powers by holding that a white man could establish an equal protection violation based upon the government's discriminatory strikes of minority jurors, it continued to emphasize that the government's behavior is especially suspeet when the defendant is also a minority by stating that

> Racial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias takes this form, it may provide one of the

> easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred.

111 S. Ct. at 1373-74 (emphasis added). See supra at 38-39.

The fact that it is the government, and not the defendant, using peremptory challenges to exclude racial minorities from the jury in cases involving minority defendants, see Developments, supra at 1565, strongly suggests that racial identity is in many cases the government's (hidden) explanation for "adoption of the forbidden stereotype." As one commentator said: "By abusing peremptory challenges, prosecutors ensure that the underrepresentation of minorities at the venire level is increased on the individual jury." Id. at 1566.

The prohibition against discriminatory strikes by the government helps to control the problem of racism on juries, but it is often not sufficient to counteract the very real possibility that racism will continue to infect the process. If a minority defendant believes that the jury was affected by racial

bias, he or she has no meaningful legal recourse: Rule 606(b) of the Federal Rules of Evidence and many corresponding state rules exclude juror testimony to impeach the verdict except in limited circumstances arguably not designed to ferret out race prejudice. Id. at 1595-98. Peremptory strikes by the defendant, and particularly the minority defendant, help to "even out" this potentially stacked deck. For when such a defendant strikes a white juror, he or she may diminish the impact of racism on the trial in two ways: first, by eliminating a person whom he or she reasonably believes harbors some degree of racial animus; and second, by maximizing the number of people of color on the jury. Such a strike is motivated not by racism, but race consciousness, and is akin to the state's use of racial categories to remedy the lingering effects of race discrimination. See, e.g., United States v. Paradise, 480 U.S. 149, 165 (1987) ("It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy

unlawful treatment of racial or ethnic groups subject to discrimination."); United Steelworkers v. Weber, 443 U.S. 193, 204 (1979) (Title VII cannot be interpreted to proscribe race-conscious affirmative action efforts to hasten the elimination of the vestiges of discrimination).[23]

For the State of Georgia here to don a "white hat" and suggest that criminal defendants discriminate against racial minorities is ironic indeed, in light of the overwhelming evidence that, for over one hundred years, the government has attempted to exclude minorities from juries to further its purpose of securing a conviction. This Court must not permit

[23] It is important to emphasize that because the defendant is not a state actor, he or she is not held to the standard set forth in those cases challenging affirmative action programs which arose under the Equal Protection Clause. See, e.g, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The example of affirmative action, however, helps to illustrate how race consciousness becomes permissible even when sanctioned or ordered by the state, if it is necessary to combat racism. And, if it is permissible for the state to take race into account at times, it is clearly permissible for the criminal defendant, who is a private actor, to take race into account to diminish the impact of racism on a trial at which he or she has so much to lose.

the State to invoke a social justice goal so cynically.[24] The historical backdrop of jury service demonstrates that: 1) the government must be scrutinized carefully in the exercise of its peremptories during a criminal trial, particularly when the defendant is part of a racial minority; and 2) the criminal defendant, who is in fact disproportionately a racial minority, must retain the freedom to use his or her peremptories in an unfettered manner -- even to the extent of sometimes making race conscious strikes.

CONCLUSION

The criminal defendant is involuntarily brought into litigation by an adversary which wields a fearsome investigative and enforcement power: the State. He or she may lose liberty and even life itself. Yet the Constitution, and

[24] It is especially ironic that the State of Georgia is protesting its concern for racial justice here when a few years before it was also before this Court on the claim that its criminal justice system sought and imposed the death penalty in a racially discriminatory manner. McCleskey, 107 S. Ct. 1756.

particularly the Bill of Rights, protects that defendant against abuses which prevail in places commonly understood to be police states, where accusations and convictions often collapse into a short but brutal end to life. At the vital center of those rights is the Sixth Amendment right to a jury trial. This Court must insure the continued integrity of the jury trial for the individual whom it was designed to protect -- the defendant -- by protecting the defendant's right to exercise his or her peremptory challenges without constraint. No defendant should be forced to trial with a jury whom he or she determines cannot be fair. No defendant, and particularly the defendant who is a racial minority, should be forced to explain how and why he or she senses danger in the group about to decide his or her fate.

Respectfully submitted,

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